Public Prosecutor v Ting Sing Yong & Ors

HIGH COURT (SIBU) — CRIMINAL APPEAL NO 20-41-5 OF 1996
TEE AH SING J
4 SEPTEMBER 1997

Betting, Gaming and Lottery *— Gaming — Presumption of — Requirements to be fulfilled — Whether presumptions under ss 6(2) and 19 arose — Necessity of proof of legal entry — Whether entry must be effected by search warrant — Whether on the evidence the accused ought to be found guilty — Common Gaming Houses Act 1953 ss 6(2), 16, 17, 18 & 19*

On 13 February 1993, a police party led by one Chief Insp Peter ak Umbuas ('PW3') conducted a raid at a workshop ('the workshop') where the respondents were arrested. They were later charged with gaming in a common gaming house under s 6(1) of the Common Gaming Houses Act 1953 ('the Act') but were subsequently acquitted and discharged. The prosecution appealed. The prosecution submitted that the evidence of PW1 and PW2 — who were also arrested, charged and subsequently convicted of the same offence — together with PW3 and PW4 — both of which were police personnel involved in the raid — showed that the workshop was used for gaming and that the respondents were arrested at the scene of the crime. The prosecution relied on the presumption of s 6(2) of the Act. PW1 and PW2 gave evidence which denied the involvement of the respondents in committing the offence. It was submitted that the evidence of PW1 and PW2 in this respect should not be believed as they had good reason to try and save their friends, the respondents.

Counsel for the respondents submitted that for the presumption under s 6(2) of the Act to apply, the workshop must have been entered under the Act and the requirements of ss 16 and 17 of the Act must be met. These requirements, counsel submitted, were not complied with. Counsel argued that in the instant case, there was no evidence of any written information that the workshop was being used as a common gaming house, and therefore the presumption under s 19 of the Act did not arise. It was also revealed that no search warrant had been issued under s 16(1) of the Act.

Held, dismissing the appeal:

(1) In order for the presumptions under ss 6(2) and 19 of the Act to arise, it had to be shown that 'entry' according to the terms of the Act had been made, ie it must comply with the requirements of ss 16 and 17 of the Act. Such entry, in order to be effective, has to be effected by a search warrant. Subsection (1) of s 16 requires two things as a condition precedent in the issue of a search warrant under the powers conferred by it: ie, (i) there must be written information; and (ii) the person issuing must have, after any enquiry which he may deem necessary, good reason to believe that a place is kept or used as a common gaming house. The prosecution in this case tendered no such evidence.

However, in certain given situations under s 18 of the Act, a search warrant may be dispensed with but the requirements of s 18 are strict and cannot be presumed. None of these requirements met the situation of PW3 and his raiding party. As such, no effective entry as defined under the Act had taken place (see pp 78B–D, 79G–H, 80B–I and 81F–G).

(2) The respondents pleaded not guilty to the charges of gambling and their evidence was supported by PW1 and PW2, both of whom had already pleaded guilty and had been convicted of gambling. The evidence of PW1 and PW2 would also have rebutted the presumption of ss 6(2) and 19 if it could be assumed that it was raised at all. The evidence of PW1 and PW2 were uncontradicted and there was no possibility of concoction as they had no good reason in lying for either the prosecution or the respondents since they had already been convicted (see p 82C–F).

[Bahasa Malaysia summary

Pada 13 Februari 1993, sepasukan polis yang diketuai oleh Ketua Insp Peter ak Umbuas ('PW3') telah menjalankan serbuan di sebuah bengkel ('bengkel tersebut') di mana penentang-penentang telah ditangkap. Mereka kemudiannya dipertuduhkan dengan kesalahan berjudi di rumah judi terbuka di bawah s 6(1) Akta Rumah Judi Terbuka 1953 ('Akta tersebut') tetapi kemudiannya dibebaskan dan dilepaskan. Pihak pendakwa merayu. Pihak pendakwa berhujah bahawa keterangan PW1 dan PW2 — yang juga ditangkap, dipertuduhkan dan berikutnya disabit atas kesalahan yang sama — bersama dengan PW3 dan PW4 — kedua-duanya pegawai polis yang terlibat dalam serbuan — menunjukkan bahawa bengkel tersebut digunakan untuk berjudi dan bahawa penentang-penentang telah ditangkap di tempat kejadian. Pihak pendakwa bergantung pada s 6(2) Akta tersebut. PW1 dan PW2 memberi keterangan yang menafikan penglibatan penentang-penentang dalam melakukan jenayah. Adalah dihujahkan bahawa keterangan PW1 dan PW2 dalam hal ini tidak patut dipercayai kerana mereka mempunyai alasan baik untuk cuba menyelamatkan kawan-kawan mereka, iaitu penentang-penentang.

Peguam penentang-penentang menghujahkan bahawa bagi membolehkan anggapan di bawah s 6(2) Akta tersebut terpakai, bengkel tersebut mestilah telah dimasuk di bawah Akta tersebut dan keperluan ss 16 dan 17 Akta tersebut dipenuhi. Peguam berhujah keperluan-keperluan ini telah tidak dipatuhi. Peguam menghujahkan bahawa dalam kes ini, tiada keterangan tentang apa-apa maklumat bertulis bahawa bengkel tersebut digunakan sebagai rumah judi terbuka, dan maka anggapan di bawah s 19 Akta tersebut tidak timbul. Ia juga didedahkan bahawa tiada waran geledah telah dikeluarkan di bawah s 16(1) Akta tersebut.

Diputuskan, menolak rayuan:

(1) Bagi membolehkan anggapan di bawah ss 6(2) dan 19 Akta tersebut timbul, haruslah ditunjukkan bahawa 'kemasukan' menurut terma Akta tersebut telah dibuat, iaitu ia mesti mematuhi keperluan-keperluan ss 16 dan 17 Akta tersebut. Supaya berkesan kemasukan demikian haruslah dilakukan menerusi satu waran geledah. Seksyen 16(1) menghendaki dua perkara sebagai syarat terdahulu dalam mengeluarkan waran geledah di bawah kuasa-kuasa yang dikurniakannya iaitu: (i) terdapat maklumat bertulis; dan (ii) selepas apa-apa siasatan yang difikirkan perlu, orang yang mengeluarkan waran mestilah mempunyai alasan yang baik dalam mempercayai bahawa sesebuah tempat disimpan atau digunakan sebagai rumah judi terbuka. Pihak pendakwa dalam kes ini tidak mengemukakan keterangan demikian.

Namun demikian, dalam keadaan-keadaan tertentu di bawah s 18 Akta tersebut, satu waran geledah boleh diketepikan tetapi keperluan s 18 adalah ketat dan tidak boleh dianggap. Tiada satu pun daripada keperluan ini sejajar dengan keadaan PW3 dan pasukan serbuan. Oleh itu, tiada kemasukan yang berkesan sebagaimana yang ditakrifkan di bawah Akta tersebut telah berlaku (lihat ms 78B–D, 79G–H, 80B–I dan 81F–G).

(2) Penentang-penentang tidak mengaku salah kepada pertuduhan berjudi dan keterangan mereka disokong oleh PW1 dan PW2, yang mana kedua-duanya telah pun mengaku salah dan telah disabit kerana berjudi. Keterangan PW1 dan PW2 juga mematahkan anggapan ss 6(2) dan 19 andainya ia boleh dianggap bahawa ia dibangkitkan sama sekali. Keterangan PW1 dan PW2 tidak disangkal dan tiada kemungkinan telah direka kerana mereka tidak mempunyai sebab baik untuk berbohong sama ada bagi pihak pendakwa atau penentang-penentang kerana mereka telah pun disabit (lihat ms 82C–F).]

Notes

For cases on gaming, see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1676–1761.

Cases referred to

Abdul Kareem v R [1957] MLJ 185 (refd)
Alcontara a/l Ambross Anthony v PP [1996] 1 MLJ 209 (refd)
Periasamy v PP [1966] 1 MLJ 138 (refd)
PP v Tan Ann Chuan & Ors [1979] 1 MLJ 246 (refd)
Lee Ching Seng v PP [1954] MLJ 181 (refd)
PP v Lim Joo Soon [1978] 2 MLJ 127 (refd)
PP v Lin Lian Chen [1991] 1 MLJ 316 (refd)
Khoon Chye Hin v PP [1961] MLJ 105 (refd)
Tua Kin Lin v PP [1970] 2 MLJ 61 (refd)

Legislation referred to

Common Gaming Houses Act 1953 ss 6(1), (2), 16, 17, 18(1), 18(1)(a), (c), (d), 19

Appeal from: Criminal Case No A/TA/25/93 (Magistrate's Court, Sibu) A

Awang Armadajaya bin Awang Mahmud (Deputy Public Prosecutor) for the appellant.

First respondent in person.

Chew Peng Hui (*Battenberg & Talma*) for the third respondent. B

Cur Adv Vult

Tee Ah Sing J: This is an appeal by the Public Prosecutor against the decision of the learned magistrate whereby he acquitted and discharged C the third accused ('the first respondent'), the fourth accused and the 11th accused ('the third respondent') who were charged with gaming in a common gaming house under s 6(1) of the Common Gaming Houses Act 1953 ('the Act').

The prosecution evidence is that at about 6pm on 13 February 1993, D Chief Insp Peter ak Umbuas ('PW3') led a police party to a gambling raid at No 3D, Tekam Road, Sibu. PW3 and the police party alighted from the van and proceeded to the said place which is actually a workshop. Upon approaching the place, PW3 saw a group of people surrounding a table in a small room, presumably the office. Some were standing whilst some were sitting. The police party entered and introduced themselves as policemen. E When they were aware of the presence of the police party, they became very busy and some of them took money from the table and put it inside their pockets. The police ordered them not to remove anything but they disobeyed and a commotion took place. PW3 was the first to enter that small room. PW3 seized a piece of holo cloth (exh P1), one saucer F (exh P2), one bowl (exh P3), three dice (exh P4) and cash amounting to RM45 (exh P5).

PW3 ordered PC Sebastian Thomas ('PW4') to make a body search of each of them. There were 12 of them, including the third, fourth and 11th accused persons. From the body search made, cash was found on the first accused to the tenth accused. No money was found on the 11th and G 12th accused.

Expert evidence on the game of holo was given by Chief Insp Tieu Leong Seng ('PW6'). The evidence of PW6 confirms that the game played with the exhibits seized was holo, which is a banker game.

Yap Chung Jin ('PW1') stated in his examination-in-chief that on H 13 February 1993 at 6pm, he was gambling at the workshop. He was playing the game of holo with a few others. He also stated, 'If I see their faces, I can still recognize them (those gambling with me). None of them are in court now'.

In cross-examination PW1 was asked, 'The people gambling with I you are not in court today, you are sure of that?' and he answered, 'I am sure'. Sia Yew Hueng ('PW2') stated in his examination-in-chief that on 13 February 1993 he was gambling at Ah Seng Motor Workshop. There

A were also eight to nine persons playing the game of holo. He also said, 'If I see them I can recognize them. None of them are in court now'.

In cross-examination, he was asked, 'None of these accused persons were gambling there?' He answered 'Correct'.

On grounds 2.1, 2.2. 2.3, 2.4 and 2.5 of the petition of appeal, the B learned deputy public prosecutor ('the DPP') submitted that the evidence of PW1, PW2, PW3 and PW4 showed that Ah Seng Motor Workshop was used for gaming and that the respondents were arrested at the scene of the crime. The presumption of s 6(2) of the Act arises even if ss 16 and 17 are requirements of the presumption in the Act.

C In respect of grounds 2.7 and 2.8, it was submitted that ss 16 and 17 of the Act had been complied with. The raiding party was led by a senior police officer to conduct a gambling raid. It was thus submitted that the search warrant is not mandatory if a senior police officer himself led the raid. The situation is similar to a case where a DPP issues consent to prosecute when the DPP himself conducted the prosecution.

D In respect of ground 2.9, it was submitted that the police entered the premises concerned. It was submitted that PW1 and PW2 were accomplices and they were at the scene of the incident. PW1 and PW2 were among those arrested and had pleaded guilty to the same charge. Both had good reason to try and save their friends, the respondents. Their evidence must E be properly scrutinized. There is a need to see which evidence of PW1 or PW2 can be accepted and which should not be accepted. In support, the cases of *Tua Kin Lin v PP* [1970] 2 MLJ 61 and *Khoon Chye Hin v PP* [1961] MLJ 105 were cited. It was also submitted that the learned magistrate failed to make a maximum evaluation of the evidence adduced when the prosecution had proved its case beyond reasonable doubt.

F It was further submitted that impeachment was not the only way out if some witnesses were in contradiction to other witnesses especially when they are accomplices.

Learned counsel for the third respondent submitted that the G uncontradicted evidence of PW1, PW2 and PW3 showed that the respondents were not gambling.

It was submitted that until there was evidence that the respondents were involved in the crime together with PW1 and PW2, then PW1 and PW2 could not be held to be accomplices.

H It was also submitted that PW1 and PW2 were at the material times of their testimonies convicted and sentenced for their crime. Because of this, where is their interest in lying either for the prosecution or the respondents?

It was also submitted that there is absolutely no evidence that the respondents were friends of PW1 and PW2. Where is the basis for suggesting I that PW1 and PW2 might try to help the respondents?

If PW1 and PW2 were impeached, if they had made statements to the police implicating the respondents then the picture may well be different. The point is the prosecution did exactly nothing.

PW1 and PW2 cannot be accomplices if there is no evidence to prove that the respondents were gambling with them. On the evidence of PW1 and PW2, the respondents were not gambling and the learned magistrate was right in not calling for the defence. If one proceeds on the evidence of PW3, the testimony is that the respondents might or might not be gambling; on that basis the defence should not be called because there is a big question mark which the prosecuting officer did not attempt to resolve.

On the evidence, assuming the presumption in s 6(2) of the Act is applicable, that presumption has been rebutted from the evidence of the prosecution's witnesses. Presumption can be rebutted even during the prosecution's case. In support, the cases of *PP v Lin Lian Chen* [1991] 1 MLJ 316 at p 320 and *PP v Lim Joo Soon* [1978] 2 MLJ 127 at p 129 were cited.

In reply to the submission of the learned DPP, it was submitted that for the presumption under s 6(2) of the Act to apply, Ah Seng Motor Workshop must have been entered under the Act. The words 'on the occasion of it being entered under this Act' require the court to look at the procedure prescribed by ss 16 and 17 of the Act.

If there is no warrant issued under s 16 for a common gaming house to be entered, then the common gaming house cannot be said to have been entered under the Act. In the case of *Abdul Kareem v R* [1957] MLJ 185, there was a warrant issued but not in the correct form and the court held that the common gaming house had not been entered under the Act.

In the instant case, there is no evidence of any written information. There is no evidence to show that PW3 was satisfied on any written information that Ah Seng Motor Workshop was being used as a common gaming house. So the presumption under s 19 of the Act does not arise.

It was further submitted that from p 27 of the record of appeal, PW5 recorded a statement from the third respondent. In the statement, the third respondent told PW5 that he was at Ah Seng Motor Workshop to see the proprietor for the paint work done to his car and that he was not there to gamble.

The third respondent's case was put to the prosecution. The prosecution should rebut such defence or explanation as part of its case. In support, the case of *Alcontara a/l Ambross Anthony v PP* [1996] 1 MLJ 209 was cited.

The first respondent adopted the submission of learned counsel for the third respondent.

In reply, the learned DPP submitted that if a warrant is not necessary by the fact that the raid was conducted personally by a senior police officer, then it is only important that he has good reason to believe that the place was kept or used as a common gaming house. Under the circumstances as in our present case, such a written information is no longer a requirement which can prove fatal to the prosecution's case.

In respect of the evidence of PW1 and PW2, it was submitted that the impeachment or declaration of a hostile witness is not necessary. In

support, the case of *Periasamy v PP* [1966] 1 MLJ 138 was cited. So it was submitted that PW1 and PW2 were rather inconsistent or unsure of the exact number of people present at Ah Seng Motor Workshop. It was submitted that s 6(2) of the Act applies. It is for the respondents to rebut the presumption and it can only be done at the defence stage.

The learned DPP also referred to s 18(1)(c) and (d) of the Act.

In *PP v Tan Ann Chuan & Ors* [1979] 1 MLJ 246, his Lordship Ajaib Singh J at p 248 said:

> The law on the applicability of the presumptive s 19 of the Common Gaming Houses Ordinance is well-settled. Before the presumption under s 19 can arise, it must be proved that the entry on the premises was effected in strict compliance with the provisions of the Ordinance.

In *Lee Ching Seng v PP* [1954] MLJ 181, his Lordship Buhagiar J at p 182 said:

> That presumption can arise only when premises have been entered under the Ordinance. Before the presumption can arise there must be proof of how the entry was made.

Section 16(1) of the Act provides as follows:

> A Magistrate or Justice of the Peace or senior police officer on being satisfied upon written information and after any enquiry which he may think necessary that there is good reason to believe that any place is kept or used as a common gaming house may by warrant authorize any person therein named or any police officer with such assistance and by such force as may be necessary by night or by day to enter or go to such place and to search the same and all persons found therein and to seize all instruments or appliances for gaming and all money, securities for money, and other articles reasonably supposed to have been used or intended to be used for any game or lottery which may be found in such place or on any such persons and also to detain all such persons until they and the said place shall have been searched. If any of the things or circumstances which are made by this Act presumptive evidence of guilt are found in such place or on any person therein, every person found therein shall be taken before a Magistrate to be dealt with according to law.

Subsection (1) of s 16 requires two things as a condition precedent in the issue of a search warrant under the powers conferred by it: the first is that there must be written information, and secondly that the person issuing must have, after any enquiry which he may deem necessary, good reason to believe that a place is kept or used as a common gaming house.

PW3 stated in his examination-in-chief that on 13 February 1993 at 6pm, he led a party to conduct a gambling raid at No 3D, Tekam Road, Sibu which was actually a workshop, ie Ah Seng Motor Workshop.

There was no evidence adduced that before the raid, PW3 had received information stating that Ah Seng Motor Workshop was kept or used as a common gaming house. There was also no evidence that PW3 reduced that information into writing. There was also no evidence that a search warrant had been issued under s 16(1) of the Act.

I am of the view that s 16(1) of the Act has not been complied with. So the presumptions under ss 6(2) and 19 of the Act do not arise.

I shall next deal with s 18(1) of the Act.

Section 18(1) of the Act reads as follows:

> A Magistrate or Justice of the Peace or senior police officer may himself do what he may under sections 16 and 17 authorize a police officer to do whenever such Magistrate or Justice of the Peace or senior police officer is competent to issue a warrant under the said sections respectively and also in any of the following cases, that is to say —
>
> (a) if any person has within the preceding six months been convicted of having kept or used as a common gaming house the place proposed to be entered; or
>
> (b) if the place proposed to be entered is occupied by a club or society and he has reason to believe that habitual gaming is carried on there; or
>
> (c) if he has personal knowledge of such facts and circumstances as satisfy him that there are sufficient grounds for a search under the said sections respectively; or
>
> (d) if he receives the required information orally and either on oath or not on oath under such circumstances that the object of a search would, in his opinion, be defeated by the delay necessary for reducing the information to writing:
>
> Provided that in this last case the name and address of the person giving such information are known to or ascertained by such Magistrate or Justice of the Peace or senior police officer before he acts upon such information.

Section 18(1) of the Act permits a magistrate or justice of the peace or senior police officer to do what he may authorize other persons to do when he is competent to issue a warrant, that is primarily after satisfying himself by written information.

A senior police officer may also exercise this power in four other circumstances, namely: (a) if any person has within the preceding six months been convicted of having kept or used as a common gaming house the place proposed to be entered; (b) if the place is a club or society and he has reason to believe it is being used for habitual gaming; (c) if he has personal knowledge of such facts and circumstances as satisfy him that there are sufficient grounds for a search under ss 16 and 17; and (d) if he receives the required information orally and either on oath or not on oath under such circumstances that the object of a search would, in his opinion, be defeated by the delay necessary for reducing the information to writing.

There is a proviso to this para (d) that if the information is not reduced into writing, the name and address of the person giving the information are known to or ascertained by a senior police officer before he acts upon such information.

In order to justify entry under s 16(1), a senior police officer must prove he is competent to issue a search warrant — ie he is acting on written information — or that the conditions set out in s 18(1)(a)–(d) exist. These conditions cannot be presumed.

A In the case of s 18(1)(c), it must be proved that the knowledge was personally acquired and did not come by through hearsay and report but through the actual investigation and personal efforts of the senior police officer.

In the case of s 18(1)(d), the senior police officer must still act on
B information but if the time factor precludes its recording, he may still act on it. Again, this is a matter which must be proved by evidence.

In this case, PW3 only stated that he led a police party to conduct a gambling raid at Ah Seng Motor Workshop. There is no evidence that he received written information before the raid that Ah Seng Motor Workshop
C was kept or used as a common gaming house. Nor was any evidence given that it was his personally acquired knowledge of facts and circumstances that satisfied him that there were sufficient grounds for a search or what those facts and circumstances were so as to justify his entry under s 18(1)(c) of the Act.

There was also no evidence adduced that PW3 received the required
D information orally.

There was also no evidence adduced of the circumstances that the object of a search would, in his opinion, be defeated by the delay necessary for reducing the information into writing.

Further, the proviso to para (d) of s 18(1) of the Act provides that if
E the information is not reduced into writing, the name and address of the person giving the information are known to or ascertained by a senior police officer before he acts upon such information.

There was no evidence adduced by PW3 that the name and address of the informer were known to or ascertained by him.

F I am of the view that s 18(1)(d) of the Act has not been complied with.

In my opinion therefore, the entry was not under the provisions of s 18(1)(a)–(d) of the Act and therefore no presumption under ss 6(2) and 19 of the Act arises.

The learned magistrate in his ruling (at pp 39–41 of the appeal
G record) said:

> The evidence of PW3 who was the first to enter that small room is very vital in this case. PW3 — who was the leader of the raiding party — saw a group of people in that small room and presumed that they were gambling and he agreed with the suggestion of learned counsel that they might or might not
> H be gambling. PW3 could not actually see what each of them was actually doing. Among the twelve accused, some admitted to PW3 that they were gambling but PW3 cannot remember who they were. It did not occur to PW3 that the people present there might have legitimate business. It only occurred to PW3 that all of them were presumed to be gambling. Notwithstanding that PW1 and PW2 had told the court that the third,
> I fourth and 11th accused persons were not gambling, PW3 still maintained that the three persons were gambling because he believed no reasonable man would be there in that environment.
>
> In cross-examination, PW5, Sgt Andrew Ling admitted that he did record a statement from the 11th accused where the 11th accused said he was not gambling at the material time.

> From the evidence of PW1 and PW2, the third, fourth and 11th accused persons were not gambling at the material time. This seems to be consistent with their earlier testimony where only eight or nine people were gambling. Out of the 12 people charged, nine pleaded guilty, including PW1 and PW2. This is consistent with the non-involvement of the third, fourth and 11th accused persons in the gambling session at the material time. The evidence of PW3 cannot confirm that the three accused were gambling. He only made a sweeping assumption which cannot be safely relied upon at all.
>
> My finding of facts at this stage is that there is no conclusive evidence showing that the third, fourth and 11th accused persons were gambling at the material time.

There was no evidence adduced that PW1 and PW2 were friends of the respondents. Therefore, I reject the submission of the learned DPP that PW1 and PW2 had good reason to try and save their friends, the respondents.

I am of the view that the learned magistrate came to the correct finding of fact that the respondents were not gambling. The learned magistrate did not err in accepting the evidence of PW1 and PW2 that the respondents were not gambling. There was no evidence adduced to show that PW1 and PW2 had lied in court that the respondents were not gambling.

In *PP v Lin Lian Chen*, his Lordship Mohtar Abdullah J at p 320 said:

> It is trite law that statutory presumptions raised during the prosecution's case may even be rebutted during the prosecution's case itself.

Assuming for a moment that the presumption under s 6(2) of the Act arises, the presumption has been rebutted by the prosecution's own evidence, namely the testimony of PW1 and PW2 that the respondents were not gambling.

As such, the learned magistrate was correct in finding that the prosecution had not made out a case against the respondents beyond all reasonable doubt.

In view of the foregoing, I dismiss the appeal.

Appeal dismissed.

Reported by S Sankey